LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-694

DAVID G. ALLEN COMPANY, INC.,
Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

DANIEL R. DIXON
808 Capital Club Building
Raleigh, North Carolina 27601
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINIONS BELOW 1

BASIS FOR JURISDICTION 3

QUESTIONS PRESENTED FOR REVIEW 4

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 5

STATEMENT OF CASE 6

REASONS FOR GRANTING THE WRIT 9

A. The judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina were palpably in error 9

I. The Courts below allowed a recovery in quasi contract in conflict with established state law denying such recovery where a valid contract covered the matter 9

II. The Courts below allowed an equitable remedy in quasi contract to a plaintiff who was without equitable standing by reason of laches and by reason of being in violation of Federal Statute and Regulation 11

III. The Courts below erroneously determined Defendant herein was unjustly enriched .. 14

IV. There was no evidence to sustain the Second Judgment of The Court of Appeals of North Carolina 16

B. The judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina were so palpably in error as to amount to a denial of due process of law 18

CONCLUSION 25

APPENDIX

Page

EXHIBIT A—First opinion and judgment of The Court of Appeals of North Carolina 1a

EXHIBIT B—Petition to rehear the first opinion and judgment of The Court of Appeals of North Carolina. Related order denying petition 6a

EXHIBIT C—Second opinion and judgment of The Court of Appeals of North Carolina 20a

EXHIBIT D—Petition to Supreme Court of North Carolina to issue Writ to review both judgments of The Court of Appeals of North Carolina. Related order denying petition 22a

EXHIBIT E—Motion to The Supreme Court of North Carolina to reconsider its order denying writ of certiorari. Related order denying motion 34a

EXHIBIT F—Order and bond to stay execution 39a

CASES:

American Railway Express Co. v. *Levee*, 263 U.S. 19 (1923) 3
Armstrong v. *Manzo*, 380 U.S. 545 (1965) 20
Betts v. *Brady*, 316 U.S. 455 (1942) 3
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 19
Brinkerhoff-Faris Trust and Savings Co. v. *Hill*, 281 U.S. 673 (1930) 19, 23
Campbell v. *Blount*, 24 N.C. App. 368, 210 S.E.2d 513 (1975) 10
Chambers v. *State of Florida*, 309 U.S. 227 (1940) .. 20
Consolidated Freightways Corporation of Delaware v. *Admiral Corporation*, 442 F.2d 56 (7th Cir. 1971) 12, 13
Fuentes v. *Shevin*, 407 U.S. 67 (1972) 21
Gracie v. *Palmer*, 21 U.S. (8 Wheat.) 605 (1823) 9
Hurtado v. *California*, 110 U.S. 516 (1884) 19
Malinski v. *New York*, 324 U.S. 401 (1945) 20
McComb v. *Commissioners*, 91 U.S. 1 (1875) 3
Michigan Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 3

Page

Minneapolis and St. L. R.R. Co. v. *Beckwith*, 129 U.S. 26 (1889) 24
Missouri v. *Gehner*, 281 U.S. 313 (1930) 4
Munn v. *Illinois*, 94 U.S. 113 (1877) 21
Murdock v. *Memphis*, 87 U.S. (20 Wall.) 590 (1875) .21, 22
Peters v. *Kiff*, 407 U.S. 493 (1972) 18, 19
Stell v. *Trust Co.*, 223 N.C. 550, 27 S.E.2d 524 (1943).. 11
Sterling v. *Constantin*, 287 U.S. 378 (1932) 21
Taylor v. *City of Raleigh*, 22 N.C. App. 259, 206 S.E.2d 401 (1974) 12
Teamsters Union v. *Oliver*, 358 U.S. 283 (1959) 4
United States v. *Healy*, 376 U.S. 75 (1964) 3
Vetco Concrete Company v. *Troy Lumber Company*, 256 N.C. 709, 124 S.E.2d 905 (1962) 10, 22
Ward v. *Love County*, 253 U.S. 17 (1920) 16

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment XIV, Section 1 .....5, 24

STATUTES:

28 U.S.C. Section 1257(3) 3, 5
28 U.S.C. Section 2101(c) 3, 5
Interstate Commerce Act, Section 223, 49 U.S.C. Section 323 .....5, 13, 14

MISCELLANEOUS:

Interstate Commerce Commission Regulation, 49 C.F.R. 1322.1(a) (1967) 5, 14
Restatement of the Law—Restitution, Section 155 (1936) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

DAVID G. ALLEN COMPANY, INC.,
Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

The Petitioner, David G. Allen Company, Inc., respectfully prays that a writ of certiorari issued to review judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina.

OPINIONS BELOW

The judgment of The Supreme Court of North Carolina and the opinions and judgments of The Court of Appeals of North Carolina sought to be reviewed are as follows:

(a) The first opinion and judgment of The Court of Appeals of North Carolina involved herein was rendered and entered on July 17, 1974, and is reported at 22 N.C. App. 442 (1974). A copy is appended hereto as Exhibit A.

(b) A petition to rehear the above decision was timely filed with The Court of Appeals of North Carolina on August 21, 1974. Order denying such petition was entered on September 5, 1974. Said order of denial is not published. The petition and related order are appended hereto as Exhibit B.

(c) The second opinion and judgment of The Court of Appeals of North Carolina involved herein was rendered and entered on April 2, 1975 and is reported at 25 N.C. App. 315 (1975). A copy is appended hereto as Exhibit C.

(d) A petition to The Supreme Court of North Carolina for a writ of certiorari to review the above referred-to opinions and judgments of The Court of Appeals of North Carolina was filed on April 29, 1975 and denied by order rendered and entered on June 6, 1975. The order denying the petition is reported at 287 N.C. 465 (1975). A copy of the petition and related order are appended hereto as Exhibit D.

(e) A motion for reconsideration of order denying petition for writ of certiorari was filed in

The Supreme Court of North Carolina on June 24, 1975 and the order denying such motion was entered on August 25, 1975. Subject order has not yet appeared in published reports. A copy of the motion and related order are appended hereto as Exhibit E.

BASIS FOR JURISDICTION

The date of the judgments and orders and the dates of the entry of such judgments and orders are set forth in chronological sequence in the preceding paragraph.

The final order of The Supreme Court of North Carolina involved herein is dated and was entered on August 25, 1975. This petition for certiorari was filed within 90 days of such date and the time for review begins to run from such date. (*American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923); *United States* v. *Healy,* 376 U.S. 75, 77-80 (1964)).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3) and 28 U.S.C. Section 2101(c).

The instant case presents an ambiguous situation in respect to the courts below whose judgments are sought to be reviewed. Established principles require that the judgment of the highest state court that last ruled on the merits of the case is the court to which the petition for writ of certiorari be directed. (*Betts* v. *Brady,* 316 U.S. 455 (1942); *McComb* v. *Commissioners,* 91 U.S. 1 (1875); *Michigan Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954).

The nature of the problem herein involved raises the question of the propriety of the entire proceeding

under concepts of due process, including the proceedings in the highest court of the state where correction of manifest error was requested but refused. The question of due process was squarely raised in the motion for reconsideration of the order denying Petition for Writ of Certiorari. This motion was filed in The Supreme Court of North Carolina. (Exhibit E attached.)

At such stage of the proceedings, every conceivable argument had been made in respect to the merits of the case to persuade The Supreme Court of North Carolina to reconsider the decisions of The Court of Appeals of North Carolina. This question logically had to be raised after all prior remedies had been exhausted and in hopeful anticipation that justice would eventually be done in the course of normal procedural remedies. *Missouri* v. *Gehner,* 281 U.S. 313 (1930).

It is to be noted that The Supreme Court of North Carolina in its order of June 6, 1975 denying petition for a writ of certiorari affirmed "the" decision of The Court of Appeals (Exhibit D, page 10, attached). Apparently such order was meant to affirm both decisions but since it is worded in the singular, the matter is left in doubt.

The dilemma involved has caused this petitioner to designate both courts as proper courts to which the writ of certiorari could be directed. (See *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina were palpably erroneous?

2. Whether the judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina constituted a denial of due process of law within the meaning of Amendment XIV of the Constitution of The United States?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

United States Constitution, Amendment XIV, Section 1.

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

28 U.S.C. Section 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . ."

28 U.S.C. Section 2101:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Interstate Commerce Act, Section 223; 49 U.S.C. Section 323:

> "No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign

commerce until all tariff rates and charges thereon have been paid, except. . ." (Exception not applicable.)

Interstate Commerce Commission Regulation, 49 C.F.R. 1322.1(a) (1967)

"(a) *Extension of Credit.* Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the tariff charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays."

STATEMENT OF THE CASE

The defendant herein, David G. Allen Company, Inc. (hereinafter referred to as Allen) is engaged in the business of installing ceramic, tile and other types of floors. Allen entered into a contract with "Raeford Turkey Plant" located in Raeford, North Carolina, to install a certain tile or stone floor for Raeford Turkey Plant on a basis of "cost plus 10%". Allen ordered certain of the necessary materials from Master Mechanics Company in Cleveland, Ohio. Master Mechanics Company did not have the needed materials and ordered them from Minnesota Minerals, Ltd. of Havelock, Ontario, Canada. Pursuant to said order the merchandise was shipped by truck under a bill of lading designating Master Mechanics Company as consignee. The precise format on the bill of lading was as follows:

"Consignee: The Master Mechanics Co. % David G. Allen Co. Inc. % Raeford Turkey Plant Rawford, N.B., Raeford, N.C."

The material arrived on Christmas Eve, December 24, 1969 (830 bags out of a total of 930 bags). No one signed for the goods, the freight charges were not paid upon delivery and no one receipted for or formally accepted delivery of the 830 bags of goods. Federal law and Interstate Commerce Commission regulations required that the freight charges be collected at time of delivery. Thereafter, the remaining 100 bags were delivered and signed for by someone not an agent or employee of Allen.

The goods were delivered by motor vehicle to Winston Salem, North Carolina by a connecting carrier and transported from Winston Salem, North Carolina to destination at Raeford, North Carolina, by Pilot Freight Carriers, Inc., the plaintiff in this action (hereinafter referred to as Pilot).

Allen had no knowledge that the freight charges had not been paid until April 6, 1971, a period of more than 15 months after delivery, at which time a letter notice was received from Pilot requesting payment. At this time. Allen had long since settled its account with Raeford Turkey Plant. Allen did not receive payment for the costs of the freight charges from Raeford Turkey Plant. Allen was not able to persuade Raeford Turkey Plant to pay the subject freight charges. Raeford Turkey Plant had undergone a change of management during the period intervening from the time of Allen's completion of the contract until the time Pilot made claim against Allen.

The complaint, as originally filed, based its action on the theory of contract, alleging Allen was liable as a contracting party to the shipping contract evidenced by the bill of lading. Both parties and the Court re-

cognized Allen was not a party to the shipping contract. Thereafter, the trial court allowed Pilot to amend its complaint to state a cause of action on the theory of quasi contract and later allowed Pilot's motion for summary judgment on the theory of quasi contract for the amount of $1,393.77 (plus interest) specified in the bill of lading.

The case was appealed to The Court of Appeals of North Carolina and said Court sustained the judgment of the trial court except as to the adequacy of the evidence on the matter of "damages," A petition for rehearing filed with The Court of Appeals of North Carolina was denied.

The case was thereafter tried in the District Court of Wake County, North Carolina, on the issue of the amount of "damages". Such "damages" were allowed in the amount of $1,393.77 (plus interest) as specified in the bill of lading. Such latter decision was also appealed to The Court of Appeals of North Carolina and this second decision of the trial court was also affirmed.

A timely petition for certiorari was thereafter filed with The Supreme Court of North Carolina which was denied. A timely motion for reconsideration of the order denying such petition was then filed with The Supreme Court of North Carolina and this motion was denied on August 25, 1975.

Since the entering of the final order of The Supreme Court of North Carolina, a stay of execution has been procurred in the District Court of Wake County. This stay of execution and related bond are appended hereto as Exhibit F.

FEDERAL QUESTION RAISED

Review of the judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina is sought herein on the grounds that the composite proceedings, from trial court through The Supreme Court of North Carolina was so lacking in objectivity and in such disregard of established judicial precedents established in the State of North Carolina as to lack the dignity of a judicial proceeding and thereby violated the due process provisions of the Fourteenth Amendment of the Constitution of The United States.

The issue of due process was presented to The Supreme Court of North Carolina by motion for reconsideration of its order denying a writ of certiorari after all prior efforts to persuade The Supreme Court of North Carolina to review the proceedings had failed. A copy of such motion is appended to this petition as Exhibit E.

On the second appeal to The Court of Appeals of North Carolina, petitioner, in its brief, argued that the prior proceedings at that time were so lacking in objectivity as to constitute an abrogation of the "Rule of Law". However, this aspect of the case does not appear in the record appended hereto.

REASONS FOR GRANTING THE WRIT

A. The Judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina Were Palpably in Error.

It is respectfully submitted that the judgments of The Supreme Court of North Carolina and The Court of Appeals of North Carolina were so palpably and patently in error that no fair and enlightened mind

could condone such decisions and that such judgments constituted a denial of due process of law as used in the Fourteenth Amendment of the Constitution of The United States.

Point I

The Courts below allowed a recovery in quasi contract in conflict with established state law denying such recovery where a valid contract covered the matter.

A bill of lading would appear to be a valid contract beyond dispute. *Gracie* v. *Palmer,* 21 U.S. (8 Wheat.) 605 (1823). The subject bill of lading (and related Astray Freight Waybill) bear the name of Pilot Freight Carriers, Inc. on its heading; reflects Minnesota Minerals, Ltd., Havelock, Ontario, as Shipper; and reflects Master Mechanics Co., as Consignee. Nowhere in this proceeding is it alleged that the bill of lading involved was not a valid contract. It is the established law of the State of North Carolina that a valid contract preempts the right of the parties to the contract in respect to the subject matter of the contract and that no action in quasi contract is proper where a valid existing contract covers the particular matter. The principle is stated in the case of *Vetco Concrete Company* v. *Troy Lumber Company,* 256 N.C. 709, 713, 124 S.E. 2d 905, 908 (1962):

> "It is a well established principle that an express contract precludes an implied contract with reference to the same matter. (Extensive citations.)"

and further in 256 N.C. at 714, 124 S.E. 2d at 908:

> " 'The same rule has been applied to benefits conferred under a special contract with a third person. When there is a contract between two persons for the furnishing of services or goods to

> a third, the latter is not liable on an implied contract simply because he has received such services or goods. (Extensive citations).' "

The *Vetco* case has been cited as controlling law on at least four occasions since its original promulgation in 1962. As recently as January 2, 1975, The Court of Appeals of North Carolina rendered an opinion in *Campbell* v. *Blount,* 24 N.C. App. 368, 371, 210 S.E. 2d 513, 515 (1975), in which it reaffirmed the correctness of the rule of *Vetco Concrete Company,* above referred to, a date subsequent to its decision on the same point in the instant case, and squarely contradictory to its decision in the instant case saying:

> " 'No agreement can be implied where there is an express one existing. . . .' "

The *Vetco* case was cited by petitioner in its brief on the second appeal to The Court of Appeals.

The question again arises, how can a case of precedent value be controlling for situation before and after the instant case and yet be wholly ignored in the instant case?

If the mutual obligations of contract can be universally ignored, as Pilot has done in the instant case, then obviously the foundations of our entire economy are in jeopardy. Manifestly, this will not happen. However, it does aid in demonstrating the manifest error in the instant decisions sought to be reviewed. It is respectfully submitted that reasonable consistency in the application of rules of substantive law is an essential ingredient of due process of law.

Point II

The Courts below allowed an equitable remedy in quasi contract to a plaintiff who was without equitable standing by reason of laches and by reason of being in violation of Federal Statute and Regulation.

It is established law in North Carolina that a plaintiff seeking an equitable remedy must "do equity." The doctrine is stated in *Stell* v. *Trust Co.,* 223 N.C. 550, 552, 27 S.E. 2d 524, 526-527 (1943) which was cited and quoted in the instant case in brief filed in The Court of Appeals of North Carolina:

> "Laches on the part of claimants is recognized by courts of equity, in proper cases, as an available defense against stale claims . . . 'Laches is such delay in enforcing one's rights as works disadvantage to another.' 30 C.J.S., 520. It may be invoked as a defense to the prosecution of a claim cognizable in equity when there has been inexcusable delay in moving to enforce it, on the ground that equity will refuse aid to a stale claim when a party has slept on his rights. *Spiedel* v. *Henrici,* 120 U.S. 337.
>
> "In *Teachey* v. *Gurley,* 214 N.C., 288, 199 S.E., 83, it was said: 'In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied.' "

The *Stell* case has been cited with approval as recently as July 3, 1974 wherein in the case of *Taylor* v. *City of Raleigh,* 22 N.C. App. 259, 261, 206 S.E. 2d 401, 403 (1974), the Court of Appeals said:

> "It (laches) is the negligent omission for an unreasonable time to assert or enforce an equitable right."

Inconsistency in the administration of justice is again noted since the above case was decided on July 3, 1974, two (2) weeks before The Court of Appeals rendered its first decision in the instant case, which was filed on July 17, 1974.

In the instant case, delay in giving first notice to the defendant was in excess of fifteen (15) months. During such delay period, Allen had submitted its final bill to Raeford Turkey Plant; received payment for such bill and closed its account with Raeford. New management had taken over the Raeford Plant during the intervening period and refused to consider payment of the freight charge. There can be no doubt that such delay constituted laches on the part of plaintiff Pilot.

The facts in the instant case are comparable to the situation in *Consolidated Freightways Corporation of Delaware* v. *Admiral Corporation,* 442 F.2d 56 (7th Cir. 1971) which involved a delay period of 3½ months. That case said at 442 F.2d at page 60:

> "The present controversy offers additional grounds for intervention of the principles of equity. Plaintiff's transactions with Rogers involved credit extensions well beyond the seven-day limit imposed upon such transactions by the Interstate Commerce Commission. Through its unlawful and lax credit extensions, plaintiff contributed substantially to its ultimate inability to recover payment from that shipper. These practices also increased the amount of loss which resulted from Rogers financial failure. Plaintiff continued shipping goods for Rogers on credit and did not deign to notify Admiral, from whom it now seeks recompense, until well after a reasonable time had elapsed."

The precedent value of this Federal decision on The Court of Appeals of North Carolina was wholly ignored even though such case considered 3½ months in excess of a reasonable time. The instant case involved a delay in excess of 15 months.

In the cited case, credit was illegally extended in violation of statute and Interstate Commerce Commission regulations. In the instant case, plaintiff was under the same legal duty to collect its freight charges at time of delivery and was in violation of Federal statute and Interstate Commerce Commission regulations. The bill of lading specifically stipulated, "$1,373.99 COLL TOTAL THRU CHARGES", thereby negating any credit extension of any kind.

The Federal statute involved is Interstate Commerce Act, Section 223; 49 U.S.C. Section 323, which provides:

> "No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except. . ." (Exceptions not applicable).

The pertinent regulation of the Interstate Commerce Commission involved is 49 C.F.R. 1322.1(a) (1967), which provides:

> "(a) *Extension of Credit.* Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons

herein being called shippers, for a period of 7 days excluding Saturdays, Sundays and legal holidays."

In this case, Pilot was clearly in violation of the cited statute and the cited regulation. Clearly the doctrines of laches and clean hands should have been applied to deny plaintiff a recovery in quasi contract.

Point III

The Courts below erroneously determined Defendant herein was unjustly enriched.

The facts pertinent to this point are not in controversy. Defendant Allen contracted to install a stone and tile floor with and for "Raeford Turkey Plant" on a "cost plus 10%" basis. The materials were ordered and delivered as previously described. The freight charges as of this date have not been paid.

As shown by evidence in the record, it is a customary practice for the owner of the premises under such contracts to pay incidental and miscellaneous costs thereby saving the contractor's 10% and reducing his costs. Allen did not collect the freight costs from Raeford Turkey Plant.

The benefit Allen derived from shipment of the stone was the availability of the stone for integration into the structure. The stone and the floor in which they are fabricated are owned by Raeford Turkey Plant. Manifestly, if anyone has *retained* the benefit of the shipment of stone, it must be Raeford Turkey Plant.

It is to be further noted that Allen and Raeford Turkey Plant were indicated in identically the same manner on the bill of lading. After designating Master Mechanics as Consignee, the bill of lading further provided "% of David G. Allen Co Inc % Raeford

Turkey Plant." It is assumed the symbol % was used to mean c/o meaning "in care of".

The mind rebels at the idea that two separate entities could be unjustly enriched for the full shipping costs. If Raeford Turkey Plant has at all times owned the stone since their assembly into the floor, the full value of the shipping charge must have accrued to Raeford. Yet the Court of Appeals determined that Allen has received and retained the full value of the shipping costs in the amount specified in the bill of lading. Theoretically, this would allow plaintiff to recover three times for the same freight charge. Twice in quasi contract and once in contract. At most, Allen was an incidental beneficiary. The benefit Allen received was the ability to complete its contract. It did not retain the value of shipping the stone. This value passed to Raeford as a part of the cost of the stone.

In this respect, it should be noted that all parties working on the plant were "beneficiaries". The equipment installers, painters and every user of the floor obtained a "benefit from its existence. Such esoteric benefits do not equate with "unjust enrichment" as was determined by The Court of Appeals of North Carolina.

Finally, it is respectfully submitted that the determination of The Court of Appeals was not a determination of a question of fact, which this Court will normally refuse to review, but a legal conclusion. The decision in controversy was rendered on the basis of a motion for summary judgment. All factual matters were substantially agreed to by the parties involved and The Court of Appeals so determined in its first opinion. The determination that Allen was "unjustly enriched" was a legal determination based on undis-

puted facts and is manifestly an erroneous determination. It is further submitted that this determination is subject to review by this Court in the manner comparable to the facts reviewed in *Ward* v. *Love County,* 253 U.S. 17, 23 (1920).

Point IV

There was no evidence to sustain the Second Judgment of the Court of Appeals of North Carolina.

The very essence of an action in quasi contract is that there be some unjust enrichment. In all actions in quasi contract there are in theory two amounts which require consideration. First, the loss sustained by the defendant. Secondly, the amount of unjust enrichment *retained* by the defendant. The principle is of universal application and is set forth in *Restatement of the Law—Restitution,* Section 155 (1936), as follows:

> "Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, limited, if the recipient was not at fault . . . to its value in advancing the purposes of the recipient . . ."

The validity of the principle involved is established by the decision of The Court of Appeals in the instant case. In 22 N.C. App. at 444, the Court said in this case:

> ". . . In an action founded upon the theory of quasi contract, the measure of the recovery is determined by the value of the actual benefit realized and *retained. Stout* v. *Smith,* 4 N.C. App. 81, 165 S.E. 2d 789 (1969) ; 66 Am. Jur. 2d, Restitution and Implied Contracts, Section 28, p. 973."

The Court then proceeded to wholly ignore the principle of a *retained* benefit. Allen *retained* no benefit in the stone. The purpose of the "recipient" in this case was to complete installation of the floor, not to retain and use the floor. Not one scintilla of evidence in this record enlightens as to the amount that Allen received under the contract, or whether it was more or less than $1,393.77, the amount of the freight bill. The only evidence presented was the amount of the freight bill and that such amount conformed to Interstate Commerce Commission regulations.

This amount is the contract amount stipulated in the bill of lading. The Court ignored the basic concept that a quasi recovery of a quantum meruit is solely for indemnification of the plaintiff.

It is submitted that the evidence of the bill of lading shipping costs is totally unrelated to the question of the value *retained* by this defendant. The value to this defendant was not the contract price of the freight charges but the value to him of the opportunity to complete his contract. There is *no* evidence in this record on this point. In any event, it is not the type of benefit which can be valued any more so than we can value the air we breathe or the right to work or any other such intangible right.

B. The Judgments of the Supreme Court of North Carolina and the Court of Appeals of North Carolina Were So Palpably in Error as to Amount to a Denial of Due Process of Law.

It seems apparent that a fair trial is a necessary constituent of due process of law.

An essential component of a fair trial requires a reasonably fair and objective resolution of the ques-

tions of law before the tribunal. A lawfully appointed court complying with proper procedural requirements of due process of law does not alone constitute due process. Due process requires a reasonably logical application of the rules of substantive law. Recognizing there are variances in human minds and that men are subject to human infirmities, yet there are acts which can properly arouse indignation and dismay at their manifest lack of fairness. Due process recognizes a standard of fair behavior which, if not applied, constitutes a transgression of constitutional safeguards, including due process.

This Court has recognized such standards in many decisions. Exhaustive citation is not needed. The principles are found in the following quotation in *Peters* v. *Kiff,* 407 U.S. 493, 501 (1972), the Court said:

> " 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136 (1955). The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. Due process requires a competent and impartial tribunal in administrative hearings. *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) . . . "

In *Hurtado* v. *California,* 110 U.S. 516, 536 (1884), Justice Mathews said:

> " . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

This petitioner is cognizant of the long line of decisions which hold that an erroneous decision of a state court on a question of state law does not give rise to

a claim under the Fourteenth Amendment. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1930) at page 680, and cases cited therein. However, where manifest state rights are patently ignored, where established rules of state law are violated without the dignity of establishing themselves as precedents, due process becomes an empty phrase and constitutional protections are meaningless.

The need for a fair trial also received implicit sanction by this Court in the recent case of *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). On page 377 of its opinion, the Court said:

> "Prior cases establish, first, that due process requires, *at a minimum,* that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a *meaningful opportunity* to be heard." (Emphasis added.)

In *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), this Court said that what the due process provision does require is

> " . . . an opportunity which must be granted at a meaningful time and in a *meaningful manner.*" (Emphasis added.)

What is a "meaningful manner"? If the rules of law and the precedent value of the cases are capriciously, petulantly, or casually ignored, has a "meaningful manner" been provided for the adjudication of such rights? The question puts the answer. Obviously not.

In *Malinski* v. *New York,* 324 U.S. 401, 417 (1945), in a concurring opinion, Justice Frankfurter stated:

> " . . . The judicial judgment in applying the Due Process Clause must move within the limits of

> accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty."

It is redundant to state that this Court is the ultimate guardian of Federal Constitutional rights. *Chambers* v. *State of Florida,* 309 U.S. 227, 241 (1940). The power to safeguard constitutional rights carries a concomitant duty. If this Court fails to provide the needed safeguard, to whom can we turn? Is the duty entire or fragmentary?

This Court has long reviewed state legislative acts for their unconstitutionality under the due process clause of the Fourteenth Amendment, e.g., *Munn* v. *Illinois,* 94 U.S. 113 (1877).

Also, this Court has enforced principles of "procedural due process" upon state courts, e.g., *Fuentes* v. *Shevin,* 407 U.S. 67 (1972).

And this Court has exercised its power to prevent a denial of due process in violation of the Fourteenth Amendment by state executives, e.g., *Sterling* v. *Constantin,* 287 U.S. 378 (1932).

Of the three branches of government, legislative, executive and judicial, it seems clear that the judicial is the ultimate protagonist of legal and constitutional rights. It is the impact of the judiciary on the populace that vindicates purported rights. This Court has exercised its supervisory powers over state legislatures,

state executives and over state judicial procedures. It seems appropriate that it should complete the process by exercising the same benign supervisory power over state judicial decisions respecting the substantive law of the states.

It is respectfully maintained that the self-imposed restrictions which the Court adopted in the case of *Murdock* v. *Memphis,* 87 U.S. (20 Wall.) 590 (1875), to the effect, that this Court would accept as binding upon it the state court's decisions on questions of state law is not applicable in the instant case. In the instant case, the state courts are ignoring their own judicial precedents.

Not once, but repeatedly did the Courts of North Carolina refuse to follow established rules of law in the opinions and judgments sought to be reviewed. This petitioner has brought forward four major errors which it considers clear.

Compliance with any one of the four principles brought forward would have compelled judgment for the defendant Allen. Additional errors were made which were not developed because of their relative unimportance in view of the points above discussed. It is felt that the blunt refusal to apply the precedents set forth in the *Vetco* case were particularly flagrant.

The Supreme Court of North Carolina in its decision in *Vetco Concrete Company* v. *Troy Lumber Co.,* 256 N.S. 709, 124 S.E.2d 905 (1962), held without equivocation that an action in quasi contract was not proper where a valid contract existed in respect to the matter. In the instant case, the Court of Appeals of North Carolina and The Supreme Court of North Carolina have ignored this basic rule of law estab-

lished by the highest court in the state without comment or establishing a superceding rule of law. The *Vetco* case was cited by The Court of Appeals of North Carolina as controlling law both before and after the instant case as above shown, but was not applied as controlling law to this case.

In all events, it is respectfully submitted that irrespective of the precedent force of *Murdock* v. *Memphis,* that this Court has the authority to fully implement the due process clause of The Fourteenth Amendment by unequivocally asserting its jurisdiction over state court decisions when a Federal Constitutional right warrants such intervention. The immunity now enjoyed by state courts does not enhance the sanctity of Constitutional rights but provides an avenue for their infringement.

It is further maintained that a full and proper implementation of the due process clause of the Fourteenth Amendment requires the supervisory influence of this Court over state judicial proceedings in respect to both procedural and substantive law matters.

This Court said in the *Brinkerhoff* case, 281 U.S. at 680:

> "... The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

The situation in the instant case is felt to be within the scope of due process as developed in the *Brinkerhoff* case, 281 U.S. at 681-682, wherein the Court said:

> "... Undoubtedly, the state court had the power to construe the statute dealing with the state tax

> commission; and to re-examine and overrule the *Laclede* Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."

It is submitted that the general principle established by the decisions of this Court, to the effect that the highest court of the State has the right to interpret and establish its own precedents, is not in issue in the instant case. The issue in this case is simply whether or not a state court can ignore its own precedents. The finality of such state precedents, in regard to the right and power of this Court to review, and as referred to above in *Brinkerhoff*, is not here involved.

This Court in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673 (1930), endorsed the principle that every party in a state civil cause *must* be given a reasonable opportunity to be heard on the merits. It is a natural corollary of this principle that consideration be given *to the merits*. It is submitted that a hearing on the merits, in which the respective merits are totally disregarded, is a violation of due process of law to the same or a greater degree than no hearing whatsoever. It is merely a little more difficult to detect.

A hearing *on the merits* assumes the existence of a reasonably responsible judiciary and a reasonable intellectual effort to discover and apply the rules of law involved in the problems before it. Otherwise, a hearing on the merits is an exercise in futility and the rule of law an empty shibboleth.

Our appellate courts, in composite, are the keepers of the conscience of the nation. The standards and ethics of such courts shape and form the mores of the people. Respect for law is engendered by consistent enforcement of principles of law, not by judicial fiat stemming from personalized sense of justice. Our legal systems and institutions are being subjected to criticism in an unparalleled degree. The highest degree of integrity and judicial competence is needed to regain public confidence.

Amendment XIV, Section 1, to the Constitution of the United States provides:

> "nor shall any state deprive any person of life, liberty or property, without due process of law."

A corporation has long been determined to be a person for purposes of Amendment XIV. *Minneapolis and St. L. R.R. Co.* v. *Beckwith,* 129 U.S. 26 (1889).

A fair trial is essential to due process. Decision flowing from caprice or personalized concepts of justice do not constitute the administration of law or justice and do not constitute "Equal Justice Under Law". Confiscation of property by naked judicial fiat is not due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DANIEL R. DIXON
Counsel for Petitioner
808 Capital Club Building
Raleigh, North Carolina 27601

APPENDIX

APPENDIX

No. 7410DC311 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

(FILED JULY 17, 1974)

From Wake

PILOT FREIGHT CARRIERS, INC.

v.

DAVID G. ALLEN COMPANY, INC.

Appeal by defendant from Barnette, Judge, 22 October 1973 Session of District Court held in Wake County. Heard in the Court of Appeals on 30 May 1974.

This is a civil action wherein the plaintiff, Pilot Freight Carriers, Inc., a North Carolina corporation, seeks to recover the sum of one thousand three hundred seventy-three dollars and ninety-nine cents ($1,373.99) from defendant, David G. Allen Company, Inc., a North Carolina corporation. The sum sought to be recovered represents the amount allegedly owed to plaintiff as a result of plaintiff-carrier having delivered 930 bags of crushed stone to defendant for use by the latter in its construction work on the Raeford Turkey Plant.

In 1969 the defendant company entered into a contract with the Raeford Turkey Plant to install certain tile floor on a "cost plus 10%" basis. Thereafter, as a result of this contract, the defendant ordered 930 bags of crushed stone from the Master Mechanics Company in Cleveland, Ohio. The Master Mechanics Company in turn contacted a Canadian supplier, Minnesota Minerals Ltd., who shipped the crushed stone to Raeford, North Carolina. The bill of lading which accompanied said shipment consigned the goods to "The Master Mechanics Company, c/o David G. Allen Company, Inc., c/o Raeford Turkey Plant, Raeford,

North Carolina." The crushed stone was shipped from Ontario, Canada, to Winston-Salem, N.C., via Inter City Truck Lines and from Winston-Salem to Raeford by the plaintiff in the instant case. Subsequently, the crushed stone was used by the defendant company in the course of its construction work on the turkey plant.

On 6 April 1971, some fifteen months after delivery of the goods, the defendant received a first notice and demand from plaintiff for payment of the shipping charges. Defendant, denying its accountability, refused to pay the charges. On 3 November 1972, plaintiff filed a complaint seeking to recover the shipping charges from defendant and founded its claim upon express contract. Several months later the plaintiff amended its complaint, over defendant's objection, to bottom its claim in the alternative upon quasi-contract. The defendant filed an answer denying that it was responsible for the shipping charges and counterclaimed for $137.40, which sum represents 10 percent of the costs of shipping the stone and which defendant claims it was deprived of collecting from the Raeford Turkey Plant (on its "cost plus 10 percent" contract) by the negligence of plaintiff.

Both parties moved for summary judgment; and from the granting of summary judgment for the plaintiffs in the amount of $1,373.99, defendant appealed.

Smith, Hibbert & Pahl by Carl W. Hibbert for the plaintiff appellee.

Dixon and Hunt by Daniel R. Dixon for defendant appellant.

HEDRICK, Judge.

The single question presented by this appeal is whether the trial court correctly entered summary judgment in

favor of the plaintiff. Summary judgment is the proper procedure if examination of the pleadings, interrogatories, affidavits, etc., discloses that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. G. S. 1A-1, Rule 56(c), Rules of Civil Procedure. The propriety of summary judgment in the instant case involves a discussion of the following two propositions:

(1) Was summary judgment properly entered with regard to the issue of liability; (2) Was summary judgment properly entered with regard to the issue of damages?

—I—

"In the absence of anything to indicate a contrary intention of the parties, where one performs for another a useful service of a character that is usually charged for and such service is rendered with knowledge and approval of the recipient, who either expresses no dissent or avails himself of the service rendered, the law raises an implied promise on the part of the recipient to pay the reasonable value of such service. The general rule is that where services are rendered by one person for another, and are knowingly and voluntarily accepted, without more, the law presumes that such services were given and received in the expectation of being paid for, and implies a promise to pay their reasonable worth." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 24, p. 968. See also, Root v. Insurance Co., 272 N.C. 580, 158 S.E. 2d 829 (1968).

A careful survey of the pleadings, exhibits, affidavits, and other documents filed in the motion for summary judgment reveals that the defendant did receive 930 bags of stone, which was delivered by plaintiff, and incorporated this crushed stone into the fabrication of the turkey plant.

Moreover, no express contract existed between the parties. These uncontroverted facts manifest a benefit conferred by plaintiff and acceptance of such benefit by the defendant. Such circumstances dictate, in the absence of an express contract, that quasi-contract principles be imposed to prevent one party from being unjustly enriched to the detriment of the other. Therefore, the trial court correctly entered summary judgment in favor of the plaintiff as to the issue of liability.

—II—

Next, directing our attention to whether summary judgment was properly entered with regard to the issue of damages, we are of the opinion that the trial court incorrectly granted summary judgment as to this aspect of the case. In an action founded upon the theory of quasi-contract, the measure of the recovery is determined by the value of the actual benefit realized and retained. Stout v. Smith, 4 N.C. App. 81, 165 S.E. 2d 789 (1969); 66 Am. Jur. 2d, Restitution and Implied Contracts, § 28, p. 973. The value of the services rendered and retained "is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 28, p. 973. The only evidence in this record as to the value of the services rendered by the plaintiff and retained by the defendant is that shown on the "Freight Waybill"; and while not conclusive, it may be considered, if shown to be consistent with the Interstate Commerce Commission's Schedule of Rates and Tariffs, together with other evidence, if any, in determining the reasonable value of such services.

The result is—as to the issue of defendant's liability: summary judgment for the plaintiff is affirmed; as to the

issue of damages: summary judgment for plaintiff in the amount of $1,373.99 is reversed, and the cause is remanded to the District Court for a determination of the issue of damages consistent with the principles of law herein set out.

Affirmed in part; reversed in part.

Judges MORRIS and BALEY concur.

A True Copy

THEODORE C. BROWN, JR.
Clerk of the Court of Appeals
of North Carolina

/s/ By SARAH B. HENNER
Deputy Clerk
7-18, 1974

(Caption Omitted in Printing)

PETITION FOR REHEARING TO THE NORTH CAROLINA COURT OF APPEALS

(Filed August 21, 1974)

To the Honorable Naomi E. Morris, Judge of the North Carolina Court of Appeals:

Now Comes the petitioner herein, David G. Allen Company, Inc. through counsel, and respectfully shows unto the Court that this petition is brought pursuant to Rule 44 of the Rules of Practice in the North Carolina Court of Appeals to obtain a rehearing of the above-entitled case. This petition is timely filed, being filed within forty days after the filing date of the decision of the North Carolina Court of Appeals which was July 17, 1974. A copy of said decision is attached hereto. All costs taxed against the petitioner have been paid as required by the Rules of this Court.

In the opinion filed on July 17, 1974, this Court held in substance that:

> (1) Summary judgment was properly entered in favor of the plaintiff on the issue of liability in quasi contract. The opinion states that the uncontroverted facts manifest a benefit conferred by plaintiff and acceptance of such benefit by the defendant. The opinion further states that in the absence of an express contract, quasi-contract principles should be imposed to prevent one party from being unjustly enriched to the detriment of the other party.

The defendant-appellant herein assigns the following alleged errors of law:

> (1) The Court erred by determining defendant was unjustly enriched by retaining a benefit conferred by plaintiff.

(2) The Court erred by granting equitable relief to a plaintiff who is without equitable standing before the Court.

Assignment of Error No. 1

The cost of the freight which is the subject matter of this litigation is obviously a part of the cost of the crushed stone. The crushed stone is on the floor at the Raeford Turkey Plant and manifestly the full value of the crushed stone, which includes the material cost, the installation cost, the transportation cost, and other costs, is being used exclusively by and solely for the benefit of Raeford Turkey Plant.

If this Court requires David G. Allen to pay the transportation cost, which clearly should be an ultimate liability of Raeford Turkey Plant, it would seem obvious that by some legerdemain, David G. Allen will be paying part of a cost which is properly attributable to the Raeford Turkey Plant. "Robbing Peter to pay Paul" is not equity. If this decision is allowed to stand, David G. Allen could not seek restitution from Raeford Turkey Plant even though full use and benefit of the crushed stone is retained by Raeford Turkey Plant. It would seem that equitably and lawfully David G. Allen should unquestionably be entitled to indemnification if required to pay plaintiff. The basis of a "cost plus" contract which was involved here is based on the idea of passing such costs to Raeford Turkey Plant. However, the predication of the necessity for reimbursement manifests the lack of equitable basis for imposing liability on David G. Allen in the first place.

In order to frame its decision under equitable concepts, the opinion alleged that David G. Allen was "unjustly enriched." This simply is not true. The concept of unjust enrichment is bottomed on the idea of *retaining* a *"benefit."* David G. Allen installed the subject crushed stone on a cost plus basis. It

rendered its bill to the Raeford Turkey Plant and received payment which did not include any reimbursement for the freight expense involved herein nor for the 10% profit which it would have been entitled to by paying for the subject freight expense.

The Court has apparently construed the opportunity for David G. Allen to continue with its contract for laying crushed stone, by reason of the delivery of such crushed stone, as a "benefit" bottoming a recovery in equity. It is the belief of the undersigned that the Court, by concluding that such "benefit" conferred on David G. Allen was tantamount to unjust enrichment, has confused the use of the word "benefit" as found in two principles of law which use the word in different meanings. "Benefit", as a consideration for a contract, is not synonymous with a "benefit" which is necessary to support an action in quasi contract. A "benefit", which is a consideration for a contract, can be *any* technical type of benefit which the mind can recognize as such. The general rule as set forth in 17 C.J.S., *Contracts,* Section 74, p. 757 is:

> "There is a sufficient consideration for a promise if there is *any* benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, *whether or not there is any* actual loss or detriment to him or *actual benefit* to the promisor." (Emphasis added).

However, a "benefit" for purposes of quasi-contract connotes the idea of something of economic value which is *retained* by the defendant and which enhances his net worth or constitutes an ultimate service to such defendant as a consumer; viz, a benefit *retained* which, by its very nature, it would be inequitable to permit retention of with-

out compensation. As stated in 17 C.J.S., *Contracts,* Section 6, p. 572:

> "The essential elements of quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and *retention* of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof. In other words, *the receipt of a benefit, inequitable to retain, is the essence of a quasi-contractual obligation . . .*" (Emphasis added).

There has not been an inequitable *retention* by defendant of a benefit in the present situation. *All* the economic value has been passed to the ultimate consumer. The total cost of the final product as installed encompasses many costs. It includes the cost of raw materials, the cost of labor for installation, the costs of transportation which are here in controversy, and a variety of other costs involved before the product was finally installed in the Raeford Turkey Plant. Manifestly, if this Court can conclude, *under the theory of equity,* that David G. Allen is equitably liable for a component part of the cost of a product from which it derives absolutely no ultimate beneficial use or enjoyment, then there is something hideously inappropriate in the application of equitable principles. Is the manufacturer of a car body indebted, *in an equitable sense,* to the manufacturer of the car wheels simply because the car body would be worthless without the car wheels? They are both *separate components* of an end product. The car body manufacturer manifestly derives a "benefit" from the car wheels manufacturer. Is it any different to maintain that the crushed stone contractor should be held liable for transportation costs simply because the crushed stone could not be laid without first being shipped? The freight cost is merely a *separate component* of an end product. The Court, in this case, has used a benefit which the crushed

stone installer derived from the crushed stone shipper as the foundation for a recovery on *equitable principles,* which is no different from the benefit the car wheel manufacturer bestows on the car body manufacturer. Such action by the Court, if not reversed, would establish the doctrine that mutual and reciprocal dependent economic processes provide the basis for equitable recoupment between two parties in the economic chain, even though neither party is the ultimate user or consumer of the product involved and neither party thereby *retains* any economic benefit in the end product involved. Instead, they become equitably liable to each other by reason of their positions as defendant or plaintiff in a law suit. Equity, by its very essence, does not embrace such a ridiculous and absurd result.

Manifestly, forcing David G. Allen to pay for a product used and consumed by the Raeford Turkey Plant will constitute confiscation by legal fiat of property of David G. Allen Company for the benefit of Pilot Freight Carriers. Again, the only phrase that seems to adequately describe this situation is the the old adage of "Robbing Peter to pay Paul." There is no equity in this.

Assignment of Error No. 2

In order for plaintiff to obtain the benefits of the equitable principles of quasi-contract, the plaintiff must himself stand in an equitable position before the Court. The plaintiff in this case does not occupy such a position. In its decision granting summary judgment in favor of the plaintiff based on equitable principles, the Court overlooked the basic principle of equity that "equity aids the vigilant, not those who sleep on their rights." This principle was restated in *Board of Architecture* v. *Lee,* 264 N.C. 602, 142 S.E.2d 643 (1965). In that case the Court went on to say that ". . . courts of equity discourage laches and unreasonable delay in the enforcement of rights." The non-vigilant

person will be denied equitable relief under the doctrine of laches. "Laches is the negligent omission for an unreasonable time to assert a right enforceable in equity." *Builders Supply Co. of Goldsboro, N.C., Inc.* v. *Gainey*, 282 N.C. 261, 192, S.E.2d 449 (1972). The Court in that case also stated the rule that "what delay will constitute laches depends upon the facts and circumstances of each case." (Ibid). In *Consolidated Freightways Corporation of Delaware* v. *Admiral Corporation*, 442 F.2d 56 (7th Cir. 1971), the Court treated a delay period of three and one-half months as sufficient to invoke laches. The plaintiff in this case waited *fifteen* months after delivery of the subject crushed stone before giving first notice to the defendant. In consideration of the holding in *Consolidated Freightways*, this is clearly an appropriate case for the application of the doctrine of laches.

The Court also overlooked the principle that equity will deny relief in those situations where a defendant, who might otherwise be vulnerable to equitable redress, has so changed his position between the time that the equitable transaction occurred and the time that the suit is instituted that his position in such suit has been adversely affected. In *Teachey* v. *Gurley*, 214 N.C. 288, 199 S.E. 83 (1938), the Court stated:

> "In equity, *where lapse of time has resulted in some change* in the condition of the property or *in the relations of the parties*, which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an in-

> jury would otherwise be done to the defendant by reason of the plaintiff's delay." (Emphasis added).

Due to the extended delay of plaintiff in the present case, David G. Allen's position has changed so that, if he is held liable for the transportation costs, he will not be able to obtain reimbursement from the Raeford Turkey Plant. He has rendered his final bill to Raeford and he has received payment thereof. In addition, the Raeford Turkey Plant has undergone a change in management and the new management has rejected requests for payment of these costs. As stated in *Consolidated Freightways Corporation of Delaware* v. *Admiral Corporation,* 442 F.2d 56 (7th Cir. 1971) at page 60:

> "(3) The present controversy offers additional grounds for intervention of the principles of equity. Plaintiff's transactions with Rogers involved credit extensions well beyond the seven-day limit imposed upon such transactions by the Interstate Commerce Commission. Through its unlawful and lax credit extensions, Plaintiff contributed substantially to its ultimate inability to recover payment from that shipper. These practices also increased the amount of loss which resulted from Rogers' financial failure. Plaintiff continued shipping goods for Rogers on credit and did not deign to notify Admiral, from whom it now seeks recompense, until well after a reasonable time had elapsed."

It is difficult to conceive of a case which is more on all fours with the *Consolidated Freightways* case than is the present case. Thus, in this case, even if there had been an unjust enrichment of David G. Allen, *which clearly there was not,* the plaintiff should be denied recovery because he does not have an equitable standing upon which he can base his action in equity.

The proper measure of recovery in quantum meruit, which the Court has directed to be the measure of recovery in this case, is the reasonable value of the services rendered by Pilot Freight Carriers but it is limited to the value of the actual benefit realized and *retained* by the defendant. This Court has specifically adopted this measure of recovery in *Stout* v. *Smith,* 4 N.C. App. 81, 165 S.E.2d 789 (1969) where the Court stated:

> "The measure of recovery for services furnished or goods received under the doctrine of unjust enrichment, as distinguished from the doctrine of contracts implied in fact, is the value of the actual benefit realized and retained." (Supra at 792). (Emphasis added).

The basis of such liability lies in preventing unjust enrichment. In this case the benefit, and therefore the unjust enrichment, was realized and retained solely by Raeford Turkey Plant. Since David G. Allen did not realize and retain *any* of the benefit of the services rendered by the plaintiff, the measure of recovery is properly zero. Again, the net result of the present decision, if not changed, will have the totally inequitable result of "Robbing Peter to pay Paul."

CONCLUSION

It is respectfully submitted that the decision results from

(1) The Court having misconstrued the meaning of a benefit by crisscrossing the meaning of the word "benefit" as used to define a technical consideration to support a contract with the meaning of "benefit" within the concepts of quasi-contract.

(2) The Court overlooked two basic principles of equity that:

(a) "Equity aids the vigilant, not those who sleep on their rights," and

(b) Equity will deny relief in those situations where a defendant has so changed his position that it would be unjust to permit the prosecution of the claim.

The unfairness of the decision as it now stands seems manifest beyond equivocation.

Wherefore, petitioner prays that a rehearing be granted, that the judgment of this Court heretofore entered on July 17, 1974 be vacated, that the judgment of the trial court be reversed, and that the opinion of this Court be modified to agree with the provisions of law and controlling authorities set out in the foregoing motion for rehearing.

/s/ Daniel R. Dixon
Daniel R. Dixon
Attorney for Defendant-Appellant
808 Capital Club Building
Raleigh, North Carolina 27601
Telephone: (919) 832-2997

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

/s/ Daniel R. Dixon
Daniel R. Dixon
Attorney for Defendant-Appellant
808 Capital Club Building
Raleigh, North Carolina 27601
Telephone: (919) 832-2997

(Caption Omitted in Printing)

Certification

I, JAMES D. BLOUNT, JR. do hereby certify that I am presently and have been for a period of five years hereto, a member in good standing of the Bar of the Court of Appeals of North Carolina, that I have no interest in the subject matter of this suit, that I have not been counsel for either party to this suit, that I have carefully examined this case including the opinion of this Court filed herein, and the law bearing thereon, and the authorities cited in this Court's decision, and that I respectfully submit that said decision is erroneous in the following particular matters:

1. The order granting summary judgment in favor of the plaintiff on the issue of liability was erroneous because the defendant did not retain any actual benefit as is required for a recovery in equity on the principles of quasi-contract. The Court has apparently confused the meaning of a "benefit" as used in defining consideration for a contract with the meaning of a "benefit" for purposes of quasi contract. All benefits conferred by the plaintiff have accrued to and are retained by Raeford Turkey Plant.

2. The order granting summary judgment in favor of the plaintiff on the issue of quasi contract was also erroneous because the Court apparently over-looked two basic principles of equity.

(a) "Equity aids the vigilant, not those who sleep on their rights." The plaintiff in this case delayed 15 months without excuse before making demand on defendant.

(b) Equity will deny relief where lapse of time has resulted in a change in the relation of the parties such that it would be unjust to permit prosecution of the

claim. Plaintiff in this case delayed billing defendant until long after defendant had rendered his final bill to Raeford Turkey Plant. During this period, defendant had received payment in full and Raeford Turkey Plant had undergone a change in management. As a result, defendant could not recoup from Raeford Turkey Plant any amount he would be required to pay under the decision of the Court of Appeals in this case.

Due to plaintiff's violation of these equitable principles, plaintiff should be barred by laches from recovering in equity.

August 21, 1974

/s/ James D. Blount, Jr.

Sworn and subscribed to before me this 21st day of August, 1974.

/s/ Janie T. Smith
Notary Public

My commission expires 10-5-75
[Seal]

Ex. B, Page 11

(Caption Omitted In Printing)

Certification

I, Eugene Boyce, do hereby certify that I am presently and have been for a period of five years hereto, a member in good standing of the Bar of the Court of Appeals of North Carolina, that I have no interest in the subject matter of this suit, that I have not been counsel for either party to this suit, that I have carefully examined this case including the opinion of this Court filed herein, and the law bearing thereon, and the authorities cited in this Court's decision, and that I respectfully submit that said decision is erroneous in the following particular matters:

1. The order granting summary judgment in favor of the plaintiff on the issue of liability was erroneous because the defendant did not retain any actual benefit as is required for a recovery in equity on the principles of quasi-contract. The Court has apparently confused the meaning of a "benefit" as used in defining consideration for a contract with the meaning of a "benefit" for purposes of quasi contract. All benefits conferred by the plaintiff have accrued to and are retained by Raeford Turkey Plant.

2. The order granting summary judgment in favor of the plaintiff on the issue of quasi contract was also erroneous because the Court apparently over-looked two basic principles of equity.

(a) "Equity aids the vigilant, not those who sleep on their rights." The plaintiff in this case delayed 15 months without excuse before making demand on defendant.

(b) Equity will deny relief where lapse of time has resulted in a change in the relation of the parties such that it would be unjust to permit prosecution of the

claim. Plaintiff in this case delayed billing defendant until long after defendant had rendered his final bill to Raeford Turkey Plant. During this period, defendant had received payment in full and Raeford Turkey Plant had undergone a change in management. As a result, defendant could not recoup from Raeford Turkey Plan any amount he would be required to pay under the decision of the Court of Appeals in this case.

Due to plaintiff's violation of these equitable principles, plaintiff should be barred by laches from recovering in equity.

August 21, 1974

/s/ Eugene Boyce

Sworn and subscribed to before me this 21st day of August, 1974.

/s/ Nancy C. Brown
Notary Public

My commission expires: 10-1-74.
[Seal]

Ex. B, Page 13

Office of the Clerk

Court of Appeals of North Carolina

P. O. Box 2779

Raleigh, North Carolina 27602
Telephone Area Code 919 829-3561

THEODORE C. BROWN, JR.
Clerk

September 5, 1974

Mr. Daniel R. Dixon
Attorney at Law
808 Capital Club Building
Raleigh, North Carolina 27601

Re: Freight Carriers v. Allen Co.
No. *7410DC311*

Dear Mr. Dixon:

The following order has been entered in the above case:

"The petition filed in this cause on the 21st day of August, 1974, and designated petition to rehear is denied. This the 5th day of September, 1974. Morris, Judge."

Yours very truly,

/s/ THEODORE C. BROWN, JR.
Theodore C. Brown, Jr.
Clerk
Court of Appeals

cc: Mr. Carl W. Hibbert
P.O. Box 345
Raleigh, N.C. 27602

No. 7410DC1070

NORTH CAROLINA COURT OF APPEALS

FILED: 2 APRIL 1975

Wake County
No. 72-CVD-9171

PILOT FREIGHT CARRIERS, INC.

v.

DAVID G. ALLEN COMPANY, INC.

Appeal by defendant from Barnette, Judge. Judgment entered 21 October 1974 in District Court, Wake County. Heard in the Court of Appeals 11 March 1975.

Plaintiff instituted this action seeking to recover shipping charges for delivery of crushed stone used by defendant in construction of a floor at the Raeford Turkey Plant. The trial court entered summary judgment for plaintiff in the amount of $1,373.99. This Court affirmed as to defendant's liability on quasi-contract but remanded for determination of damages. *Freight Carriers* v. *Allen Co.*, 22 N.C. App. 442, 206 S.E.2d 750 (1974). The jury returned a verdict for plaintiff in the amount of $1,373.99. From judgment entered, defendant appealed to this Court.

Smith, Hibbert & Pahl, by Carl W. Hibbert, for plaintiff appellee.

Daniel R. Dixon for defendant appellant.

ARNOLD, Judge.

In its opinion remanding this case as to the issue of damages, this Court said:

> "The only evidence in this record as to the value of the services rendered by the plaintiff and retained by the defendant is that shown on the 'Freight Waybill'; and while not conclusive, it may be considered,

> if shown to be consistent with the Interstate Commerce Commission's Schedule of Rates and Tariffs, together with other evidence, if any, in determining the reasonable value of such services." Freight Carriers v. Allen, 22 N.C. App. 442, 444-45, 206 S.E. 2d 750, 752-53 (1974).

Plaintiff, relying on the above language, presented a rate expert who testified that according to tariffs filed with the ICC the total charges for services rendered were $1,373.99. Defendant offered no evidence. The trial court instructed the jury that, if they found $1,373.99 to be reasonable and consistent with the ICC's schedule of rates and tariffs, they must render a verdict for plaintiff in that amount. In light of our prior disposition of this case, we must find no error in the instruction.

No error.

Judges Britt and Morris concur.

A True Copy
Theodore C. Brown, Jr.
Clerk of the Court of Appeals
of North Carolina

By /s/ Janet Jackson
Deputy Clerk
April 4, 1975

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

PILOT FREIGHT CARRIERS, INC.

v.

DAVID G, ALLEN COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS TO REVIEW ITS DECISIONS

Filed April 29, 1975

Now COMES the petitioner herein, David G. Allen Company, Inc., through counsel, and respectfully shows unto the Court:

I

That the above entitled cause of action has been twice appealed to the Court of Appeals and that this petition seeks review of the decisions rendered in both said appeals. That in regard to the first of said appeals, this petition is brought pursuant to Rule 34 of the Supreme Court Rules and Rule 2(b) of the Supplementary Rules of the Supreme Court to obtain appellate review by the Supreme Court of the said cause after determination by the Court of Appeals. That petition for certiorari of the first appeal was not made pursuant to Rule 2(a) of the Supplementary Rules of the Supreme Court within 15 days after the date of certification of the determination of the Court of Appeals because said first decision was not a final disposition of the matter and both decisions are companion cases and petition for certiorari more properly awaited until both decisions were rendered. That in regard to the second of said appeals, this petition is brought pursuant to Rule 2(a)

of the Supplementary Rules of the Supreme Court to obtain appellate review by the Supreme Court of the said cause after determination by the Court of Appeals. This petition is timely filed within 15 days after the certification date which was April 14, 1975. Both opinions of the Court of Appeals are attached hereto.

II

That this action was originally instituted to recover the amount due on a contract. That the complaint was thereafter amended to state a claim for recovery in quasi contract for the reasonable value of services rendered. The Honorable Henry V. Barnette, Jr., trial judge, rendered Summary Judgment in favor of plaintiff in the amount of $1,373.99, and defendant appealed. The Court of Appeals affirmed on the issue of liability under quasi contract and granted a new trial on the issue of the amount of such liability. The new trial was heard before the Honorable Henry V. Barnette, Jr. and a jury. The jury answered the issue of what amount the plaintiff was entitled to recover of the defendant in the amount of $1,373.99. Upon this verdict the court entered judgment for the plaintiff in the amount of $1,373.99 and defendant appealed. The Court of Appeals found no error in the instructions of the trial judge.

III

The defendant brings this petition to have both determinations by the Court of Appeals reversed, contending that the causes involve legal principles of major significance to the jurisprudence of North Carolina, and further that the decisions of the Court of Appeals are in conflict with a decision of the Supreme Court of North Carolina.

ARGUMENT

Point One

The Subject Decisions of the Court of Appeals Are Squarely in Conflict With a Decision of the Supreme Court Which States That There Can Be No Implied Contract With Reference to a Matter Which Is the Subject of an Express Contract.

Petitioner respectfully assigns as error the refusal of the Court of Appeals to follow the principles stated in *Vetco Concrete Company* v. *Troy Lumber Company,* 256 N.C. 709 (1962).

Plaintiff's original complaint stated a cause of action based on a contract, i.e., a freight waybill, which listed the consignee as the following: "The Master Mechanics Company, c/o David G. Allen Co., Inc., c/o Raeford Turkey Plant, Rawford, N.B. Raeford, N.C." Said freight waybill was a contract between the plaintiff and Master Mechanics Company. After the pleadings of plaintiff and defendant had been completed, defendant filed a motion for summary judgment, supported by an affidavit by the president of defendant corporation which stated that said defendant was not a party to the contract in question. Defendant did not enter into a contract with plaintiff for transportation of the subject materials. Defendant did not ratify such transportation agreement. Defendant did not execute a receipt for delivery of subject materials. Plaintiff thereafter moved to amend its complaint to state a cause of action in quasi contract so as to claim a quantum meruit as damages. *Plaintiff amended its complaint because plaintiff realized that defendant was not a party to the contract in question.* Rather than seek recovery from the company that was the party to the subject contract, plaintiff pursued this action in quasi contract against this defendant, who was *not* a party to said contract.

Such course of action taken by plaintiff is prohibited by a decision of the North Carolina Supreme Court. In *Vetco Concrete Company* v. *Troy Lumber Company*, 256 N.C. 709 (1962). Headnote 1 provides:

> "The rule that there can be no implied contract with reference to a matter which is the subject of an express contract extends to instances in which goods or services which benefit one person are furnished under an express contract with another and in reliance upon the credit of such other, in which event there can be no implied promise to pay, *based on the theory of unjust enrichment,* on the part of the person benefited." (Emphasis added).

The *Vetco* case not only stated the basic rule, it further applies the rule to the situation where the benefit of the contract passed to a person who was not a party to the contract. Even in such a case, the existence of the contract prohibits recovery from the person benefited on principles of implied contract.

Throughout the present case, defendant has persistently argued that it did not retain the benefit of subject contract and that therefore the *Vetco* application of the rule in the *Vetco* case is not necessary to our position. However, assuming arguendo, that defendant had retained a benefit, which defendant denies, recovery by plaintiff on principles of quasi contract is clearly prohibited by the *Vetco* case. The contract existing between plaintiff and Master Mechanics Company clearly prohibits recovery by plaintiff against this defendant for quantum meruit in quasi contract. Quantum meruit is designed to prevent unjust enrichment. If parties have entered into a contract regarding the subject matter, and one party has agreed to pay for the services of the other, then there can be no unjust enrichment under the doctrine of the *Vetco* case.

Defendant contends that, in the present case, plaintiff and Master Mechanics Company entered into a contract and

that the benefits of the contract were retained by Raeford Turkey Plant, not by the defendant. Therefore, the existence of the contract between said parties regarding the shipping charges prohibits recovery from defendant for unjust enrichment.

Defendant respectfully contends that the *Vetco* case is clearly applicable to the present case and the refusal of the Court of Appeals to recognize the rule of the *Vetco* case was error.

Point Two

The First Decision Rendered by the Court of Appeals Improperly Commented on Evidence While Remanding for New Trial.

The petitioner respectfully assigns as error the act of the Court of Appeals in citing its own erroneous obiter dicta as controlling in the second appeal on the same matter.

The Court of Appeals, in its first decision in this matter, found that the trial court had incorrectly granted summary judgment on the "issue of damages." The Court briefly discussed the measure of recovery in an action for quantum meruit, and stated that the only evidence in the record as to the value of the services rendered by plaintiff and retained by defendant was that shown on the freight waybill. However, the Court went on to state, concerning the freight waybill, the following:

> "... ; and while not conclusive, it may be considered, if shown to be consistent with the Interstate Commerce Commission's Schedule of Rates and Tariffs, together with other evidence, if any, in determining the reasonable value of such services."

It is stated at 5B C.J.S. *Appeal and Error,* Sect. 1835(a), p. 224, that:

> "As a general rule, an appellate court possesses broad powers as to the scope and extent of its decision

> and relief, although it should not decide a matter not before it, or grant relief beyond its jurisdiction."

At page 228, the following is stated:

> "It has been held improper for the upper court to express an opinion on the weight and sufficiency of evidence on any issue to be subsequently tried by a jury or trial court."

The case of *MacClure* v. *Accident and Casualty Co. of Winterthur, Switzerland,* 229 N.C. 305, 49 S.E. 742 (1948) is cited for the above proposition. The *MacClure* case states:

> "The Supreme Court will refrain, so far as possible without destroying clarity of its opinion, from commenting on evidence when case is remanded for new trial."

The Court of Appeals improperly stated what evidence it felt would be appropriate on remand at the new trial. This type of statement is expressly forbidden by the *MacClure* case. The statement does not clarify the opinion such as to make it permissible under the *MacClure* case. Instead, it adds confusion to the opinion.

The trial court, on remand, viewed the quoted statement by the Court of Appeals as the law of the case. Defendant attempted to have the jury instructed that it had to determine the value of what was realized *and retained* by defendant; i.e., the value of the unjust enrichment *to the defendant.* The trial judge refused to give defendant's requested instructions to the jury. Thus, the issue at the new trial was limited only to the question of the value of the transportation service to the plaintiff.

On the second appeal to the Court of Appeals, the quoted statement which was made on the first appeal concerning the evidence was treated by the Court of Appeals as the

law of the case. This point is illustrated by the fact that the Court in its second opinion quoted the subject portion of their first decision and stated, "In light of our prior disposition of this case, we must find no error in the instruction."

It is stated at 5B C.J.S. *Appeal and Error,* Section 1821(c), p. 190 that:

> "To be effective as the law of the case, the adjudication must be within the authority and jurisdiction of the court pronouncing it."

In *Hayes* v. *City of Wilmington,* 91 S.E. 2d 673, 243 N.C. 525, 91 S.E. 2d 673 (1956), the following is stated at p. 536:

> "However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the court. Such expressions are obiter dicta and ordinarily do not become precedents in the sense of settling the law of the case. . .
>
> "In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but obiter dicta."

It is respectfully submitted that the Court of Appeals did not have the authority to comment on the sufficiency or kind of evidence on ordering the remand and a new trial. Such comment was treated as the law of the case and caused error which was prejudicial to defendant. Petitioner respectfully assigns as error said acts of the Court of Appeals.

Point Three

The Subject Decisions of the Court of Appeals Are in Conflict With a Decision of the Supreme Court of North Carolina Which States That Laches Will Prevent Enforcement of a Stale Claim in Equity.

Petitioner respectfully assigns as error the failure of the Court of Appeals to recognize the defense of laches in the present case.

Plaintiff in this action delayed fifteen months after subject delivery before billing defendant for subject shipping charges. Plaintiff has argued that it billed defendant only six days after it was told by Master Mechanics Company, whose name appears on the freight waybill, that defendant was liable for such charges. However, the delay as to this defendant occurred for the fifteen months, not for six days. It is irrelevant that the delay occurred while plaintiff was billing someone other than this defendant. The facts of major significance are that plaintiff

slept on its rights and that it caused detriment to the defendant. The thrust of the defense of laches is, as is stated in *Teachey* v. *Gurley*, 214 N.C. 288, 199 S.E. 83:

> "In equity, where lapse of time has resulted in some *change* in the condition of the property or *in the relations of the parties* which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied."

It is clear from the facts that plaintiff delayed in proceeding to collect subject freight charges. During the period of this delay, defendant completed its work for and billing of Raeford Turkey Plant and Raeford Turkey Plant underwent a change of its management. Had defendant been billed within a reasonable amount of time, it could have forwarded the bill of Raeford Turkey Plant,

who, according to their agreement, paid for all such bills. However, when defendant finally received the subject freight bill, it, as a gesture of good faith, requested Raeford Turkey Plant to pay and Raeford Turkey Plant refused. Thus, the change in the relation of the parties and resulting detriment to defendant, is clearly illustrated.

It is also significant to note, when determining what length of delay constitutes laches in this case, that plaintiff is required by 49 U.S.C.A. 323 and the regulations of Interstate Commerce Commission to collect all freight charges on delivery or, if credit has been previously arranged, within seven days thereafter.

Defendant argued the point of laches in the first appeal in this matter, but the Court of Appeals did not respond to the argument. While it is true that whether or not laches can be shown depends on the facts and circumstances of each case, it is the sincere opinion of the defendant that the facts and circumstance of the present case demand that the defense of laches be applied. If a final decision is rendered against defendant in this case, defendant will have to pay the shipping charges for one reason and one reason only: because plaintiff did not promptly bill defendant.

In response to this argument, and in an attempt to excuse its delay, plaintiff has argued that defendant could have joined Raeford Turkey Plant as a third party defendant. However, the mere fact that Raeford Turkey Plant *could* have been joined by defendant should not impose upon defendant the contractual liability of Master Mechanics Company for the freight waybill. Defendant was not liable before its opportunity to join Raeford Turkey Plant; Defendant did not become liable by reason of its decision not to join Raeford. Therefore, it could not be liable for

its decision not to join Raeford Turkey Plant. The ultimate liability for a debt is not created in one party by its failure to join another party as a third party defendant. Plaintiff had the opportunity to file its original action against Raeford Turkey Plant. Plaintiff cannot lawfully impose liability on this defendant merely by suing it. As stated before, the freight waybill listed the following: "Master Mechanics Co., c/o David G. Allen Company, Inc., c/o Raeford Turkey Plant, Rawford, N.B., Raeford, N.C." Defendant was sued only because Master Mechanics Company told plaintiff to sue defendant. Such instruction by Master Mechanics Company did not by itself impose liability on defendant. Master Mechanics Company was not in a position to determine that defendant was liable. Master Mechanics Company was itself liable on its contract. Master Mechanics Company could only state that it itself was not liable and attempt to avoid a suit by pointing its finger at another party. It is suggested that plaintiff should have sued Master Mechanics Company and Raeford Turkey Plant rather than this defendant.

Defendant respectfully contends that the defense of laches is applicable to the present case and that failure of the Court of Appeals to apply the defense was error.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that its Petition for Writ of Certiorari to the North Carolina Court of Appeals be granted.

This the 29 day of April, 1975.

/s/ Daniel R. Dixon
Daniel R. Dixon
Attorney for Petitioner
808 Capital Club Building
Raleigh, N.C. 27601
Telephone: (919) 832-2997

NORTH CAROLINA
WAKE COUNTY

DANIEL R. DIXON, certifies that he is the attorney for David G. Allen Company, Inc., that he has read the foregoing and knows the contents thereof, that the same is true of his own knowledge except as to matters based upon information and belief and as to those he believes them to be true.

This 29 day of April, 1975.

/s/ DANIEL R. DIXON
Daniel R. Dixon
DIXON & HUNT
808 Capital Club Building
Raleigh, North Carolina
27601

TENTH DISTRICT

No. 104PC

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

PILOT FREIGHT CARRIERS, INC.

v.

DAVID G. ALLEN COMPANY, INC.

(7410DC311)
and
(7410DC1070)

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(RECEIVED JUNE 13, 1975)

This cause came on to be considered upon the petition of the defendant for writ of certiorari to review the deci-

sion of the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the petition be denied and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

And it is considered and adjudged further that the defendant do pay the sum of TEN AND NO/100 ($10.00) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 6th day of June, 1975.

ADRIAN J. NEWTON
Clerk of the Supreme Court of North Carolina

By:
/s/ JOHN R. MORGAN
Assistant Clerk

cc: Dixon & Hunt, Attorneys at Law
Smith, Hibbert & Pahl, Attorneys at Law

Copies of the two opinions of the Court of Appeals, herein set forth in the Appendix as Exhibit A and Exhibit C were appended to the Petition for a Writ of Certiorari to the Court of Appeals of North Carolina.

Ex. D, Page 12

(Caption Omitted in Printing)

MOTION FOR RE-CONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(Filed June 24, 1975)

Comes now the defendant herein, through its counsel, Daniel R. Dixon, and respectfully moves the Court to reconsider its Order Denying Petition for Writ of Certiorari in the above cause.

As reasons therefor, it is respectfully shown that the decisions of the Court of Appeals are patently and clearly in conflict with a decision of this Court and that the degree of departure of the subject decisions of the Court of Appeals from established decisions of this Court and the principles of the common law are so great as to constitute a denial of due process of law.

The system of jurisprudence of this country is premised on the fundamental concept of the "Rule of Law." The concept of due process of law embodies this principle and contemplates a rational and logical application of established legal principles to the facts involved, at least to the degree that the minds of reasonable people might differ.

The sovereignity of the state is administered through its judicial system as well as its executive and legislative branches. The Rule of Law is composed of two major elements. It contemplates a logical and rational interpretation of the substantive principles of law involved. It further contemplates the enforcement of its judicial mandates by the sovereign power of the state and, if necessary, the implementation of such power by executive order, the policy power and the military forces. A fundamental assumption to the Rule of Law is that it be based on logic and reason. Such an assumption predicates

that judicial interpretation is controlled and directed by enlightened justices, using judicial integrity, resulting from a conscientious application of human intellect to the problem at hand. The "Rule of Law" and "Due Process of Law" do not embrace a capricious, a petulant, a cynical or a willful deviation from easily and clearly ascertained rules and principles of law. The "Rule of Law" binds the Courts and the populace alike. While the minds of reasonable men may differ as to many problems, there are many instances where the mandate of law is so clear, patent and unequivocable that a single course or application of the law emerges to all rational minds. Such is the present case.

In the case of *Vetco Concrete Company* v. *Troy Lumber Company,* 256 N.C. 709 (1962), Headnote 1 provides:

> "The rule that there can be no implied contract with reference to a matter which is the subject of an express contract extends to instances in which goods or services which benefit one person are furnished under an express contract with another and in reliance upon the credit of such other, in which event, there can be no implied promise to pay, based on the theory of unjust enrichment, on the part of the person benefited."

The facts in the instant situation show that there *was* an express contract with a person other than the defendant, that defendant took no part in the making of such contract and that the Court of Appeals rendered decision against defendant on the theory of unjust enrichment. This is a clear case of misapplication of the law.

The foundation of a free society is the willing obedience of the members of that society to the rules of law. The Rule of Law contemplates a high quality of judicial effort and a consistent application of the principles embodied in such rules of law. A quixotic, arbitrary or unjustified decision causes an increased disrespect for the Rule of Law

and the entire system of jurisprudence. The rising wave of crime, that is continuously growing with its enormous and ominous threat to society, is in the last analysis a massive and growing disrespect for the Rule of Law and those who administer our judicial systems. Its causes are not so narrow as to be attributable solely to its criminal law aspects. It is a basic and massive disrespect for all rules of law and the entire adminstration of judicial process. When the courts of this land ignore manifest principles of clearly ascertainable rules of law, the mind recoils with shock at its impact on the peoples of a free society. Disrespect for law by the justices themselves can do naught but accelerate and enhance the massive growth of disrespect for law as obviously evidenced by acts of the "criminal element." Like the classic analogy of the hidden iceberg, it is clear that the overt acts of the criminal element reflect an underlying, growing and massive disrespect for the Rule of Law and disrespect for the courts responsible for its administration.

The issuance of a judicial mandate and its enforcement by the sovereign power of the state does not alone constitute due process of law. The Rule of Law continuously contemplates the application of reasonable standards of judicial effort to determine the correct substantive law of the case by applying a mental effort at a high level and at least to such extent that reasonable and rational men might differ. A judicial determination based on reasons that fall below this level constitute a procedural exercise of arbitrary judicial sovereignty without rational or reasonable foundation. As such, it is an exercise of tyranny and is alien to the institutions of a free society and precipitates a resurrection of the ancient struggle to resist the yoke of tyranny. Tyranny may flow from the judiciary or from a dictator with equal force. In all cases, every act of tyranny moves us towards the twilight of freedom. The two

decisions of the Court of Appeals here involved are manifestly erroneous. If allowed to stand, they constitute a denial of due process of law and if enforced constitute a taking of property by judicial fiat utterly lacking in legal justification.

This the 24 day of June, 1975.

Respectfully submitted,

/s/ Daniel R. Dixon
Daniel R. Dixon
Dixon and Hunt, *Attorneys*
808 Capital Club Building
Raleigh, N.C. 27601
Telephone: (919) 832-2997

Supreme Court of North Carolina

ADRIAN J. NEWTON, *Clerk*

AREA CODE 919 829-3723 — P.O. BOX 2170
RALEIGH, NORTH CAROLINA 27602

MRS. FREEDA D. SHERMAN
MRS. PEGGY N. BYRD
MRS. DEJUAN W. WEAVER
Deputy Clerks

JOHN R. MORGAN
Administrative Assistant-Assistant Clerk

September 2, 1975

Mr. Daniel R. Dixon
Attorney at Law
808 Capital Club Building
Raleigh, North Carolina 27601

Re: Pilot Freight Carriers
vs.
David G. Allen

No. 104PC, Spring Term 1975
(7410DC311) (7410DC1070)

Dear Mr. Dixon:

Petition for reconsideration of order denying petition for writ of certiorari is filed with the following order:

> "Denied by order of the Court in Conference this the 25th day of August 1975. Exum, J. For the Court."

Yours very truly,

/s/ ADRIAN J. NEWTON
Adrian J. Newton
Clerk of the Supreme Court

AJN: dww

cc: Carl W. Hibbert, Attorney at Law
Theodore C. Brown, Clerk, Court of Appeals

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 72-CVD-9171

NORTH CAROLINA
WAKE COUNTY

PILOT FREIGHT CARRIERS, INC., *Plaintiff*,

v.

DAVID G. ALLEN COMPANY, INC., *Defendant*.

ORDER

(FILED SEPTEMBER 18, 1975)

THIS CAUSE coming on to be heard upon motion of the Defendant for an injunction to stay execution of the Judgment rendered in this proceeding, and the same being heard in chambers at 2:00 P.M. on Tuesday, September 16, 1975, and argument being made on behalf of Plaintiff, Pilot Freight Carriers, Inc., by its attorney, Carl W. Hibbert, and argument being made on behalf of Defendant, David G. Allen Company, Inc., by its attorney, Daniel R. Dixon, and the Court concluding that said Defendant is willing to indemnify said Plaintiff against any delay in collecting on said Judgment by levy of execution.

NOW, THEREFORE, IT IS HEREBY ORDERED:

(1) That the Defendant post with the Clerk of the Superior Court of Wake County a surety bond in the amount of $2,500.00.

(2) That execution on the Judgment in this cause be enjoined and stayed until Defendant's rights of appeal by way of filing Petition for Certiorari in the Supreme Court of the United States are finally determined.

This the 18 day of September, 1975.

/s/ GEORGE R. GREENE
Honorable George R. Greene
Judge Presiding

NORTH CAROLINA
WAKE COUNTY

BOND

(FILED SEPTEMBER 24, 1975)

KNOW ALL MEN BY THESE PRESENTS that David G. Allen Company, Inc., a corporation organized and existing under the laws of the State of North Carolina, with principal place of business at Raleigh, North Carolina, as Principal, and United States Fidelity and Guaranty Company, Inc., a corporation organized and existing under the laws of the State of Maryland, and duly qualified to conduct business in the State of North Carolina, with its principal place of business located at Baltimore, Maryland North Carolina, as Surety, are held and firmly bound unto Pilot Freight Carriers, Inc., a corporation organized and existing under the laws of the State of North Carolina, and having its principal place of business at Winston-Salem, North Carolina, in the sum of Two Thousand Five Hundred and No/100 ($2,500.00) Dollars for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

That the conditions of this bond are such that if, upon the exhaustion of all of its legal remedies to seek reversal of that certain judgment entered in favor of Pilot Freight Carriers, Inc., in that certain proceeding in District Court of Wake County, No. 72-CVD-9171, including its right to Petition for Writ of Certiorari to the Supreme Court of the United States, the said judgment remains in full force and effect, and the said David G. Allen Company, Inc., promptly thereafter pays and discharges said judgment in full, or if said judgment shall be reversed, then this bond shall be null and void, otherwise to remain in full force and effect.

IN TESTIMONY WHEREOF, said Principal and Surety have signed, sealed and delivered this bond this the 18th day of September, 1975.

PRINCIPAL:

DAVID G. ALLEN COMPANY, INC.
/s/ By: ROBERT C. ROBERSON
President

SURETY:

UNITED STATES FIDELITY AND GUARANTY COMPANY, INC.

/s/ By: WALTER J. SNIDER
Attorney-in-fact

COUNTERSIGNED

/s/ WALTER J. SNIDER
Licensed Resident Agent

ATTEST:
/s/ IRMA G. SMITH
Witness to Surety

Certified Copy

GENERAL POWER OF ATTORNEY

No. 83646

Know all Men by these Presents:

That UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Fitzgerald S. Hudson, Jay A. Norem, Collier Cobb, III, A. H. A. Williams, II, John L. Clarke,

David M. Spencer, Walter J. Snider and William A. Shrake of the City of Chapel Hill, State of North Carolina its true and lawful attorneys in and for the State of North Carolina for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said UNITED STATES FIDELITY AND GUARANTY COMPANY, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever anyone of the said Fitzgerald S. Hudson and the said Jay A. Norem and the said Collier Cobb, III and the said A. H. A. Williams, II and the said John L. Clarke and the said David M. Spencer and the said Walter J. Snider and the said William A. Shrake may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said UNITED STATES FIDELITY AND GUARANTY COMPANY has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 13th day of April, A. D. 1973.

UNITED STATES FIDELITY AND GUARANTY COMPANY

/s/ JAMES A. MAPPUS
Vice-President

[SEAL]

/s/ JOHN H. AITKEN
Assistant Secretary

[SEAL]

STATE OF MARYLAND, }
BALTIMORE CITY } ss:

On this 13th day of April, A.D. 1973, before me personally came James A. Mappus, Vice-President of the UNITED STATES FIDELITY AND GUARANTY COMPANY and John H. Aitken, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said James A. Mappus and John H. Aitken were respectively the Vice-President and the Assistant Secretary of the said UNITED STATES FIDELITY AND GUARANTY COMPANY, the corporation described in and which executed the foregoing Power of Attorney; that they knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so fixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first day in July, A.D. 1974.

[SEAL]

//s HERBERT J. AULL
Notary Public.

STATE OF MARYLAND, }
BALTIMORE CITY } Sct.

I, Robert H. Bouse, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that Herbert J. Aull, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was the the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 13th day of April, A. D. 1973.

/s/ ROBERT H. BOUSE

[SEAL]

Clerk of the Superior Court of Baltimore City

Ex. F, Page 6

Copy of Resolution

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization what-

soever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such local bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Jerome W. Dobbyn, an Assistant Secretary of the UNITED STATES FIDELITY AND GUARANTY COMPANY, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to Fitzgerald S. Hudson, Jay A. Norem, Collier Cobb, III, A. H. A. Williams, II, John L. Clarke, David M. Spencer, Walter J. Snider and William A. Shrake of Chapel Hill, North Carolina, authorizing and empowering them to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July, 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the UNITED STATES FIDELITY AND GUARANTY COMPANY on 18th September, 1975.

/s/ JEROME W. DOBBYN
Assistant Secretary.